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Kathleen V. Duffield

West Virginia University College of Law

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STUDENT NOTES

COMPENSATING VICTIMS OF CRIME: EVOLVING CONCEPT OR DYING THEORY?

A middle-aged woman is robbed by several youths who steal her paycheck and during the altercation, knock her to the ground. She suffers a broken hip and must miss several weeks of work. She has no medical insurance, is not yet eligible for Medicare, and since her injury is not work related, she does not receive any workmen's compensation benefits.

An independent taxi driver is robbed and then shot by his assailants. The offenders are caught and the driver brings a civil suit against them but recovers nothing because the assailants are indigent. The driver has a wife and three dependent children to provide for.

A hitchhiker strikes the salesman who offered him a ride in the head, face and shoulders with an iron pipe and then steals the car. The salesman's insurance covers the theft of the car but he has no private medical insurance coverage for himself. He leaves the hospital four days later, incurring \$2,000 worth of medical bills and a loss of four days salary.

A young woman is raped, the rapist is never caught, but several months later she discovers that she is pregnant. Legally, she may seek an abortion, but she does not possess the financial resources with which to do so.

Crime is so prevalent in our society that many people are becoming immune to its daily occurrence, but there remain the innocent victims who need aid to meet the financial burdens precipitated by victimization. If the above hypothetical situations occurred in a state or country where crime victim compensation laws have been enacted these victims would be financially compensated despite the fact the criminals are still at large, were convicted, acquitted or were the subjects of a civil action.

This article will seek to review the underlying justifications and theories as well as the psychological and sociological need for crime victim compensation legislation. It will also review recent federal legislation, a uniform model for state legislation and the projected costs of establishing a state or national program of victim compensation.

In 1965 California became the first state to enact a comprehensive program to compensate victims of violent crimes, following the lead of socially progressive New Zealand and Great Britain. To date, twenty-two states have comprehensive programs to compensate victims of violent crimes.¹ Georgia² and Nevada³ have statutes compensating "Good Samaritans"⁴ only. Research indicates that "[n]o jurisdiction initiating a compensation program has repealed it; indeed, many have expanded benefits as experience has shown that the cost is not exorbitant."⁵

In West Virginia, numerous bills advocating victim compensation programs have been introduced in both the House of Delegates and Senate during the past few years. At the present time, none of these bills have successfully passed. It is sincerely hoped that this article will provide the needed insight for the drafting of a workable and viable legislative proposal and the initiative to carry it through to enactment.

At the federal level, the United States Senate passed the Victims of Crime Act of 1973 in March of that year. This Act provided for a program whereby seventy-five percent of a state-enacted program which complied with federal standards would be financed by the federal government. Though most observers

¹ ALASKA STAT. §§ 18.67.110-.180 (Supp. 1977); CAL. GOV'T CODE §§ 13959-69.1 (Deering) (Supp. 1979); DEL. CODE ANN. tit. 11, §§ 9001-9017 (Cum. Supp. 1978); FLA. STAT. ANN. §§ 960.01-.25 (Cum. Supp. 1978); HAW. REV. STAT. §§ 351-1 to -70 (1976 Replacement Vol.); ILL. ANN. STAT. ch. 70, §§ 71-84 (Smith-Hurd Cum. Supp. 1979); KY. REV. STAT. §§ 346.010-.180 (1977); MD. ANN. CODE art. 26A, §§ 1-17 (1973 Replacement Vol.); MASS. GEN. LAWS ANN. ch. 258A, §§ 1-7 (West Cum. Supp. 1977-1978); MICH. COMP. LAWS ANN. §§ 18.351(1)-(18) (Supp. 1979); MINN. STAT. ANN. §§ 299B.01-.16 (West Cum. Supp. 1978); MONT. REV. CODES ANN. §§ 71-2601 to -2605 (Cum. Supp. 1977); N. J. STAT. ANN. §§ 52:4B-1 to -21 (West Cum. Supp. 1979-80); N.Y. EXEC. LAW §§ 620-635 (McKinney 1972); N. D. CENT. CODE §§ 65-13-01 to -20 (Supp. 1977); OHIO REV. CODE ANN. §§ 2743.51-.72 (Page Supp. 1977); PA. STAT. ANN. tit. 71, §§ 180-187 (Purdon Cum. Supp. 1977-78); TENN. CODE ANN. §§ 23-3501 to -3517 (Cum. Supp. 1976); VA. CODE §§ 19.2-368.1-.18 (Cum. Supp. 1979); WASH. REV. CODE ANN. §§ 7.68.010-910 (Supp. 1978); WIS. STAT. ANN. §§ 949.01-.18 (West Cum. Supp. 1979-80). See also R.I. GEN. LAWS §§ 12-25-1 to -14 (Cum. Supp. 1978) (not to be implemented until federal legislation is enacted).

² GA. CODE ANN. § 47-518 (1979).

³ NEV. REV. STAT. ch. 217 (1977).

⁴ For example, a "Good Samaritan" under Nevada law is one who is attempting "to prevent the commission of crime or to arrest a suspected criminal or aiding or attempting to aid a police officer to do so." NEV. REV. STAT. ch. 217.190 (1977).

⁵ Lamborn, *The Propriety of Governmental Compensation of Victims of Crime*, 41 GEO. WASH. L. REV. 446, 461 (1973) [hereinafter cited as LAMBORN].

seemed to think passage by the House of Representatives was forthcoming,⁶ the Act failed to pass and has been superseded by the Victims of Crime Act of 1977.

The Victims of Crime Act of 1977, House Resolution 7010, was introduced May 9, 1977 and passed the House on September 30, 1977.⁷ It never reached the Senate for vote by the end of the 95th Congress and will, therefore, have to be reintroduced in 1979. The bill proposes that those state crime victim compensation programs which meet seven requirements would become eligible for a federal grant financing fifty percent of such a program. Victims of "analogous"⁸ federal crimes would be fully compensated by the federal government. The state program requirements will be dealt with in more detail later in this article.

The National Conference of Commissioners on Uniform State Laws toiled for three years to produce the Uniform Crime Victims Reparation Act in 1973.⁹ A year later the American Bar Association fully approved the Act.¹⁰

Alternatives to State Compensation

When a violent crime has been committed and an innocent victim, bystander or even a good samaritan has been physically injured, existing common law remedies will rarely be workable in all situations or even be available to the average victim.

One possible remedy is to file suit against the appropriate law enforcement agency for its failure to provide adequate protection.¹¹ "The great obstacle which must be surmounted, however, is the

⁶ Rothstein, *How the Uniform Crime Victims Reparations Act Works*, 60 A.B.A. J. 1531, 1532 (1974); see also Note, *Compensating Victims of Crime*, 26 ME. L. REV. 125 (1974).

⁷ H.R. 7010, 95th Cong., 1st Sess., and S. 551, 95th Cong., 1st Sess., 123 CONG. REC. S1899 (1977).

⁸ *Id.* at 4, n.4. " 'Analogous' Federal crimes are those that occur within a State which would be covered by the State's crime victim compensation program but for the fact that they are subject to exclusive Federal jurisdiction. . . . "

⁹ Uniform Crime Victims Reparations Act, UNIFORM LAWS ANN., 11th ed., 33-49 (promulgated 1973). Also reprinted in *Victims of Crime Compensation Legislation: Hearings Before the Subcommittee on Criminal Justice of the House Committee of the Judiciary*, 94th Cong., 1st & 2nd Sess. (1975-76) 51-58.

¹⁰ Rothstein, *How the Uniform Crime Victims Reparations Act Works*, 60 A.B.A. J. 1531 (1974).

¹¹ But see Note, *Compensation for the Criminally Injured Revisited: An Emphasis on the Victim?*, 47 NOTRE DAME LAW. 88, 94 (1971).

concept of sovereign immunity, based on the dual theory that the king can do no wrong and that liability would hamper the effective functioning government."¹² Even where immunity barriers have been overcome, most municipalities would still be protected in their conduct of activities which are "governmental" as opposed to "proprietary."¹³ An exception was the famous case of *Schuster v. City of New York*,¹⁴ in which the victim's decedent was allowed to recover from the city where the victim had been a police informant and had been killed. The New York Court of Appeals, however, later distinguished this case from the average situation of the typical citizen who is victimized. The court pointed out that the situation is quite distinct "where the police authorities undertake responsibilities to particular members of the public and expose them, without adequate protection, to the risks which then materialize into actual losses."¹⁵

Whether supportive or critical most authorities on the subject of victim compensation agree that the use of current civil sanctions against criminal offenders produce few or inadequate results. First and foremost, the offender must be apprehended before he can be tried in a court of law. Considering the fact that fewer than forty percent¹⁶ of the more than five million crimes reported annually in the United States result in arrests, the premise that civil sanctions are adequate is erroneous. Secondly, the victim must prove his own damages in addition to proving the offender's indentity and liability. This is costly in both the victim's time and money. Lastly, even if found liable, the offender will usually be insolvent.¹⁷ The

¹² *Id.*

¹³ See, PROSSER, LAW OF TORTS § 31 (1971). "There is ordinarily no liability for the torts of police officers, even where they commit unjustifiable assault and battery, false arrest, trespass on land or injury to property, or are grossly negligent. . . ."

¹⁴ 5 N.Y.2d 75, 180 N.Y.S.2d 265, 154 N.E.2d 534 (1958).

¹⁵ *Riss v. City of N.Y.*, 22 N.Y.2d 579, 583, 293 N.Y.S.2d 897, 899, 240 N.E.2d 860, 861 (1968).

¹⁶ Forer, *The Law: Excessive Promise and Inadequate Fulfillment*, 24 CRIME & DELINQUENCY 197, 202 (1978). The figures available in the 1977 Uniform Crime Reports indicate that approximately ten million (rather than five million) offenses are committed each year. Of these, the clearance rate was 21% of the total crimes committed. "Law enforcement agencies clear a crime when they have identified the offender, have sufficient evidence to charge him, and actually take him into custody." 1977 UNIFORM CRIME REPORTS 160.

¹⁷ Interpreting a new study, one writer said, "Among inmates who were either awaiting trial or who were sentenced to jail terms, the survey showed that the model

offender may have exhausted his assets to pay his defense counsel in his criminal trial, placed them beyond the reach of the law, have to use them first to provide for his dependents if sentenced to imprisonment, or he may simply never have had any assets initially.¹⁸ One author advocates the instigation of a civil system similar to the French system where the civil claim, the *l' action civile*, becomes a part of the criminal trial conducted by the government and the victim is merely a *civile partie*.¹⁹ Notwithstanding the fact that our legal system is based on common law principles rather than civil law, such a system would be hampered by exactly the same problems as present. The offender must be apprehended and he must have finances with which to reimburse the victim.

Private insurance coverage is a valuable but costly form of reparation. The persons most in need of insurance coverage against criminally inflicted injury are the same persons who can least afford it. Research shows that “. . . it is the lowest income group that suffers both the greatest incidence and risk of total person victimization . . .”²⁰ These persons typically reside in the high crime areas, which boosts the costs of any insurance premiums they would be required to pay should they seek private policies. The reality of private insurance is similar to that of private charities. Though it may reduce the total governmental burden of compensating victims of crime to a small extent, it can never be expected to reach all victims.

While current welfare programs may aid some crime victims, they are an inadequate remedy, both theoretically and practically. Theoretically, the purpose of welfare is to provide for citizens who are “in need” rather than innocent victims of crime. Practically, some of the prerequisites to receiving benefits, “a minimum length of time during which contributions have been made to the welfare program, residency requirements, requirement of a causal relation-

income category for twelve months prior to incarceration was below \$3,000.” Harland, *Compensating the Victims of Crime*, 14 CRIM. L. BULL. 203, 219 (1978).

¹⁸ Mueller & Cooper, *Society and the Victim: Alternative Responses*, in VICTIMOLOGY: A NEW FOCUS 85-86 (1974).

¹⁹ Note, *Compensating Victims of Crime: Individual Responsibility and Governmental Compensation Plans*, 26 ME. L. REV. 125, 126 (1974). See also Schafer, *The Proper Role of a Victim-Compensation System*, 21 CRIME & DELINQUENCY 45 (1975).

²⁰ Garofalo & Sutton, *Compensating Victims of Violent Crimes—Potential Costs and Coverage of a National Program* (LEAA-U.S. Gov't. Printing Office 1978) 20 [hereinafter cited as GAROFALO & SUTTON].

ship between employment and the injury or illness or a minimum or maximum age for beneficiaries"²¹ serve to reduce the effectiveness of welfare for crime victims.

The most viable alternative to compensation of crime victims by the government is the theory of restitution. Restitution looks to the offender, not a third party, for payment to the victim.²² "The restoration or reparation of the victim's position and rights that were damaged or destroyed by the criminal attack become, in effect, a part of the offender's sentence."²³ Commendable as the goals of restitution are, those programs that exist are hampered by the low wage-earning power of correctional laborers, low morale or incentive to work for victims or competing demands on the offender's pay by his or her dependents. Most importantly, compensation by restitution is sporadic and only marginally effective because most crimes are not solved by an arrest and many do not result in convictions. "Whereas compensation programs operate relatively independently of the criminal justice system and provide relief to eligible victims whether or not an offender is apprehended, with restitution the victim receives only what the offender can be made to provide."²⁴

Rationales

After all, the State which forbids our going armed in self-defense cannot disown all responsibility for its occasional failure to protect. Margery Fry

In 1957, Margery Fry, a British social reformer, drew her government's attention to the plight of crime victims via an open letter to the *London Observer*.²⁵ Although such programs are generally accepted as beneficial to society, there remains the task of convincing the taxpayers and legislators that victim compensation programs rest upon solid bases. Three theories are frequently of-

²¹ LAMBORN, *supra* note 5, at 457.

²² Hudson, Galaway & Chesney, *When Criminals Repay Their Victims: A Survey of Restitution Programs*, 60 JUDICATURE 313, 314 (1977).

²³ Schafer, *Compensation of Victims of Criminal Offenses*, 10 CRIM. L. BULL. 605, 610 (1974). Schafer advocates a combination of restitution by the criminal with the balance, or where the offender is not apprehended, the total being taken up by a state compensation system.

²⁴ Harland, *Compensating the Victims of Crime*, 14 CRIM. L. BULL. 203, 215 (1978).

²⁵ Fry, "Justice for Victims", reprinted in *Compensation for Victims of Criminal Violence—A Round Table*, 8 J. PUB. LAW 191 (1959).

ferred as rationales for victim compensation: 1) citizens have a legal right to compensation; 2) the state and its citizens have a social responsibility to aid innocent victims of crime; and 3) the welfare state has a moral obligation.

The idea that citizens have a legal "right" to compensation is said to arise from the gradual, historic separation of the victim from the criminal process.²⁶ Originally, criminal justice was a private interaction between offender and victim. With the growth of civilizations came social controls to suppress feuds and, therefore, wrongs against a member of the public became wrongs against the state. Thus, "crime became 'universalized' and the offender came 'to pay his debt to society,' rather than to the victim."²⁷ Now that the state has placed the victim in the background, relegated to the status of witness rather than principal participant, and has removed him from active cooperation, the argument proceeds that the state has an obligation to make reparations to the victim.

The other legal "right" argument asserts that the victim is *entitled* to compensation because the state failed to adequately "protect" him. This argument is tantamount to stating that "a failure of police protection is a prerequisite to any crime."²⁸ The state forbids the citizen to take the law into his own hands and, therefore, the state should bear the financial, as well as moral, responsibility for what it has brought about. For example, gun control legislation is viewed by some as an instance of the states' assertion of its supreme authority making its citizens powerless. Taxation is claimed by others as the corresponding duty fulfilled by the citizens for the state.

Jeremy Bentham asserted that compensation was "in order where (1) a crime has been committed (2) on people who have contributed to the maintenance of a society (3) which had the responsibility of protecting them."²⁹ Most states which have compensation programs adopt a similar, though not quite so legalistic stance. No state has accepted the rationale that compensation

²⁶ Note, *Compensation for the Criminally Injured Revisited: An Emphasis on the Victim?*, 47 NOTRE DAME LAW. 88, 90 (1971). Harland, *Compensating the Victims of Crime*, 14 CRIM. L. BULL. 203, 207 (1978).

²⁷ Harland, *supra* note 24, at 206.

²⁸ Note, *Compensation for the Criminally Injured Revisited: An Emphasis on the Victim?*, 47 NOTRE DAME LAW. 88, 93 (1971).

²⁹ *Id.* at 90.

should be provided because the victim has a "legal right" to it.³⁰ Were a state to take such a position, it would probably encounter serious problems in placing any type of limits on recovery.

The best and most utilized rationale for governmental compensation for crime victims is the "social responsibility" theory: the states' responsibility exceeds that of the victim. Society has accepted a responsibility to aid other groups, such as the poor, criminals, minorities, children and the elderly.

If one can interpret the constitution in a "moral" rather than a "legal" sense, then it seems that the Committee on the Judiciary of the United States House of Representatives also advocates the social responsibility theory. In a report on the Victims of Crime Act of 1977, it is stated:

It seems that we step over the body of the victim to give medical and other services to the criminal, it also seems that we step over the victims' fundamental right to life, liberty, and the pursuit of happiness to grant constitutional rights to the one who took the victim's rights away.

The Federal Government, then, like the State governments, finds itself officially, and constitutionally committed to act in this field of criminal justice. It is—perhaps not in the legal sense, but in the moral sense—a denial of equal protection for it to ignore the victims of crime.³¹

The social responsibility rationale also entails the idea that crime is simply pandemic to our society and the hardships and consequences should be diffused throughout society.³² This is the "risk-sharing theory."³³ Society itself is responsible for the prevalence of crime and as beneficiaries of the rewards of a modern, tension-plagued society, we must also share the costs of those who suffer.³⁴

³⁰ Enker, *A Comparative Review of Compensation for Victims of Crime*, in *VICTIMOLOGY: A NEW FOCUS* 121 (1974).

³¹ Victims of Crime Act of 1977, H.R. Res. 7010, 95th Cong., 1st Sess., 123 CONG. REC. S1899 (1977).

³² This rationale is also utilized by the A.B.A.'s endorsement of the Uniform Crime Victims Reparation Act. The article advocates that "Probably the principal explanation for the burgeoning interest in this kind of act is simple humanitarianism - a recognition that we all share an interest in the well-being of our neighbors and an increasing willingness to distribute the cost of catastrophe." Rothstein, *How the Uniform Crime Victims Reparations Act Works*, 60 A.B.A. J. 1531 (1974).

³³ Note, *Compensation for Victims of Violent Crimes*, 26 KAN. L. REV. 227, 228 (1978).

³⁴ Comment, *Compensation to Victims of Violent Crimes*, 61 N.W. L. REV. 72,

Crime victim compensation plans distribute the cost of society's failures evenly among the members of society. They are analogous to workmen's compensation payments whereby employees are compensated for injuries they sustain by reason of their membership in the large, collective labor force. The employers are a large, financially responsible group closely enough connected to justify shifting the loss to them.³⁵

A similar analogy can be made between products liability systems and victim compensation programs. In one commentator's words:

[T]his theory encourages manufacturers to include the cost of product-caused injuries in the price of their product. In this manner, all consumers of the product contribute to the damages awarded to the consumer who is injured by the product. In the context of crime victimization, the government occupies the same position as the manufacturer. The government collects from each citizen a contribution in the form of taxes. These contributions can then be paid to the citizens who become victims of crime.³⁶

The last rationale is that our society is a "welfare" state and, therefore, the government has a moral obligation to provide victims of crimes with monetary compensation. This is the weakest and least appealing rationale of the three. Some authorities feel that any state which takes into account the victim's financial-need status subscribes to the welfare theory. It is generally recounted that the state programs in California and New York have underlying social welfare bases.³⁷

The Need for Crime Victim Compensation

Crime victim compensation legislation cannot stop the regular increase in criminal offenses which occur each year in the United States. Perhaps, however, it can alleviate the suffering of those

89-90 (1966). See also Wolfgang, *Social Responsibility for Violent Behavior*, 43 S. CALIF. L. REV. 5 (1970).

³⁵ Miller, *Compensation for Victims of Criminal Violence—A Round Table*, 8 J. PUB. LAW 191, 203 (1959). See also Comment, *Compensation to Victims of Violent Crimes*, 61 NW. U. L. REV. 72, 84 (1966).

³⁶ Note, *Compensation for Victims of Violent Crimes*, 26 KAN. L. REV. 227, 228 (1978).

³⁷ Schafer, *Compensating Victims of Criminal Offenses*, 10 CRIM. L. BULL. 605, 620 (1974).

persons who have the misfortune of becoming a "statistic" on someone's victimization chart. The Federal Bureau of Investigation compiles the Uniform Crime Reports annually. These statistics, along with studies by the Law Enforcement Assistance Administration (LEAA) accurately depict the reality of crime in our society and will help to establish the need for a state victim compensation program and to evaluate the costs of establishing one.

In 1977, one violent crime was committed every 11 seconds and one property crime every 3 seconds. The Uniform Crime Reports for 1977,³⁸ show that of the 10,935,800 total offenses, only nine percent were violent crimes and the other ninety-one percent were property crimes. It is apparent that it would simply be impractical and unrealistic to expect to compensate victims of property loss. All present state programs, the proposed federal legislation and the Uniform Act, compensate only bodily injury or death arising from violent crime. Due to the exorbitant costs which would be incurred none presently provide for property loss or damage.

Of violent crimes, there were 19,120 murders or non-negligent manslaughters, 63,020 forcible rapes, 404,850 robberies, and 522,510 aggravated assaults in the United States in 1977.³⁹ This was an increase of 1.8% in murders and non-negligent manslaughters, an 11.1% increase in forcible rapes, a 3.7% decrease in robberies and a 6.4% increase in aggravated assaults when compared with 1976 figures.

West Virginia has a relatively low crime rate. According to 1977 Uniform Crime Reports, however, there still were 2,761 violent crimes in 1976 and 2,832 in 1977. The rates are higher in proportion to the density of the population with violent crime more prevalent in urban areas than in rural areas.

Of course, the Uniform Crime Reports are just that—*reports* of offenses. They are only as reliable as the reporting and data gathering methods used. The Law Enforcement Assistance Administration compiles *estimates* of the *total* amount of crime, both reported and unreported. For example, it is estimated that in 1975 there was a total of 151,155 rapes and attempted rapes, but only

³⁸ U.S. Dep't of Justice, 1977 UNIFORM CRIME REPORTS 35 [hereinafter cited as 1977 UNIFORM CRIME REPORTS].

³⁹ Aggravated assault is defined as, "an unlawful attack by one person upon another for the purpose of inflicting severe or aggravated bodily injury." 1977 UNIFORM CRIME REPORTS 20, *supra* note 38.

fifty-six percent were reported. There was also estimated to have been a total of 4,176,056 assaults, with only about forty-five percent being reported to the police.⁴⁰ Victim compensation programs will help the victims of reported as well as unreported crimes.

A new compensation system, suited to the needs of a modern, complex society is needed. As one commentator has noted, "Crime today is too pervasive and too complex for the legal system to solve alone Merely adding more and more police personnel and equipment has not reduced crime."⁴¹ The courtrooms cannot solve the financial plight of the victimized individual either.⁴² "Law, with its limited facilities, remedies, and sanctions cannot restructure the individual, the family, society, or the economy."⁴³

The available alternatives to state compensation are also ill-suited to the psychological needs of the victim. Victims aid the police by reporting the crime, identifying the offender if he is caught, and appearing as witnesses in the criminal trial. Without the cooperation of the victim, the realization of many law enforcement goals would be impossible. On the other hand, "[T]he contribution of the system to the life and maintenance of the individual victim . . . is largely symbolic; the victim seldom realizes immediate and tangible benefit (e.g., restitution for damages or reparations for physical injuries sustained) for services to the system."⁴⁴ The offender may be sentenced to prison where he will suffer the ultimate punishment—the loss of liberty and freedom of movement. The victim, however, may only perceive that the offender is being fed, clothed and housed at his, the taxpayer's, expense while he is left with the hospital bills to pay.

One of the classic justifications of punishment is that of expiation.⁴⁵ Supposedly, the offender must be made to atone for or be penalized for his crime; imprisonment is the current means of

⁴⁰ Sourcebook of Criminal Justice Statistics (LEAA-U.S. Gov't Printing Office 1977).

⁴¹ Forer, *The Law: Excessive Promise and Inadequate Fulfillment*, 24 CRIME AND DELINQUENCY 197, 202 (1978).

⁴² Research shows that only "a small minority of victimizations account for a disproportionate share of the losses." Most victimizations result in relatively low costs in the form of workdays lost or medical costs at all; 45% required medical attention costing less than \$100. See, GAROFALO & SUTTON, *supra* note 20, at 25 (Table 6).

⁴³ Forer, *supra* note 41, at 200.

⁴⁴ GAROFALO & SUTTON, *supra* note 20, at 12.

⁴⁵ W. RECKLESS, *THE CRIME PROBLEM* 352 (1973).

carrying out this goal. It has been said that "[H]ostile action against the offender brings about cohesiveness in society. When malefactors are made to expiate, especially before the multitude, society goes on a moral orgy, the recovery from which restores social equilibrium."⁴⁶ The difficulty, however, is that the offender must have been apprehended for there to be produced any vicarious feeling of revenge—the basis of expiation. If the offender is never apprehended or is apprehended, but not convicted, the victim may become alienated from his society and his government who promised to protect him or he may feel bitterness toward the very system which was supposed to prevent the crime from occurring in the first place.

Financial compensation can never erase the trauma, depression and other negative aspects of being sexually assaulted, robbed or attacked, but it may help one "get back on his feet." The so called "psychic restitution" one gets from knowing that the offender may be eventually punished by the state is simply too abstract and remote from the immediate needs of the victim.⁴⁷ We live in a highly industrialized and monetized society and victims should not be required to bear the economic costs of occasional failures of society and the law enforcement system.

Crime victim compensation may help restore public support and help improve police/community relationships. One of the most sociologically important provisions in a well-drafted compensation bill is the requirement that the crime must have been reported to the police and that the victim must cooperate with law enforcement authorities. Thus, because the incentive of financial compensation may increase crime reporting and aid with the superior goal

⁴⁶ *Id.* at 353. (footnotes omitted). Another author expressed his views that,

[D]ifferent theorists assign irreconcilable aims and purposes to punishment. When it comes to the question of how to satisfy the victim, however, almost all theorists hold essentially the same views. Punishment satisfies the desire for revenge, and inter alia, seems to be the expression of an instinct for vengeance. Punishment is intended not only to make the power of moral and legal order felt by the criminal, but at the same time to endeavor to compensate the victim by offering him some spiritual satisfaction.

Schafer, *Compensation of Victims of Criminal Offenses*, 10 CRIM. L. BULL. 605, 616-17 (footnotes omitted) (1974).

⁴⁷ Williams & Fish, *A Proposed Model for Individualized Offender Restitution through State Victim Compensation*, in VICTIMOLOGY: A NEW FOCUS 158 (1974).

of crime prevention, some authorities propose that this is the most valid rationale for victim compensation of all.⁴⁸

Drafting Victim Compensation Legislation

There are now many thorough and informative comparative studies of the twenty-two state programs which can provide guidance to legislative drafting committees.⁴⁹ There are also a number of excellent current articles evaluating the performance of specific state and foreign countries' programs, some of which have been in effect for a number of years.⁵⁰ A small area of case law is even developing, the result of appeals from decisions by state compensation boards.⁵¹ As noted above, the proposed Federal act⁵² will

⁴⁸ See McAdam, *Emerging Issue: An Analysis of Victim Compensation in America*, 8 URBAN LAWYER 346 (1976). Also, Representative Russo, a member of the Sub-committee on Criminal Justice, stated during hearings on crime victim compensation:

Our criminal justice system is not working, and one reason why is that our citizens have lost faith in the system, and are reluctant to cooperate with law enforcement agencies. They feel they have been victimized by the criminal justice system through delays, rudeness, lack of compassion, and uncompensated losses.

This has resulted in an alarming and unfortunate trend. Victims of crime are hesitant to come forward. Unreported crime runs two to four times as great as reported crime.

Victims of Crime Compensation Legislation: Hearings Before the Sub-Committee on Criminal Justice of the Committee of the Judiciary, 94th Cong., 1st & 2nd Sess. (1975-76).

⁴⁹ E.g., Note, *Compensation for Victims of Violent Crimes*, 26 KAN. L. REV. 227 (1978); Brooks, *Compensating Victims of Crime—Recommendations of Program Administrators*, 7 LAW & SOC. REV. 445 (1973); McAdam, *Emerging Issue: An Analysis of Victim Compensation*, 8 URBAN LAWYER 346 (1976); EDELHERTZ AND GEIS, *PUBLIC COMPENSATION TO VICTIMS OF CRIME* (1974).

⁵⁰ E.g., Carrington, *Victim's Rights Litigation—a Wave of the Future*, 11 U. RICH. L. REV. 447 (1977); Gross, *Crime Victim Compensation in North Dakota*, 53 N. D. L. REV. 7 (1976); Note, *Tennessee's Criminal Injuries Compensation Act*, 7 MEMPHIS ST. U. L. REV. 241 (1977); Geis and Edelhertz, *California's New Crime Victim Compensation Law*, 11 SAN DIEGO L. REV. 880 (1974); Hodgins, *The Criminal Injuries Compensation Board, The 1st 10 Years*, 6 ANGLO-AMER. L. REV. 34 (1977).

⁵¹ *Criminal Injuries Compensation Bd. v. Remson*, 282 Md. 168, 384 A.2d 58 (1978); *Holmes v. Criminal Injuries Compensation Bd.*, 278 Md. 60, 359 A.2d 84 (1976); *Criminal Compensation Board v. Gould*, 273 Md. 486, 331 A.2d 55 (1975); *Gurley v. Commonwealth*, 49 Mass. App. Dec. 78 (Dist. Ct. 1972); *In the Matter of Shelia Carr, Deceased*, 136 N.J. Super. 344, 346 A.2d 406 (1975); *Zimney v. N.D. Crime Victims Reparations Bd.*, 252 N.W.2d 8 (N.D. 1977); *Hughes v. N.D. Crime Victims Reparation Bd.*, 246 N.W.2d 774 (N.D. 1976).

⁵² *Victims of Crime Act of 1977*, H.R. 7010, 95th Cong., 1st Sess.; S. 551, 95th

make states which meet minimum requirements eligible to receive grants equal to fifty percent of the State program's cost of paying compensation.⁵³ The federal bill was drafted to allow the states maximum flexibility in formulating their individual programs and it is this writer's opinion that the seven requirements will not unduly hamper a state in tailoring legislation to meet the state's needs.

The seven requirements for state programs are:

(1) The state program must compensate, (a) victims who suffer personal injuries as a result of a qualifying crime, and (b) dependents of individuals whose deaths were the result of a qualifying crime.

(2) All aggrieved claimants must have the right to administrative review and appeal of the board's decision.

(3) The program must require the victim to cooperate with appropriate law enforcement authorities.

(4) The program must require the appropriate law enforcement agencies to inform victims about the existence of a state victim compensation program and how to go about making a claim.

(5) The state must be subrogated to any claim that the claimant has against the perpetrator of the qualifying crime.

(6) The state program cannot require the claimant to apply for or award a claimant welfare benefits unless he or she received such benefits prior to the occurrence of the crime.

(7) The state program must have a provision which denies or reduces a claimant's award if it is found that the victim's actions contributed to the occurrence of the crime.⁵⁴

The proposed federal act does not cover administrative expenses, awards for pain and suffering, or property loss. The maximum allowable award is \$50,000 with only \$200 per week being the maximum claim for lost earnings. In addition, it specifies that \$100 shall be the minimum amount awarded and that the crime must have been reported within seventy-two hours after its occurrence.

Cong., 1st Sess., 123 CONG. REC. S1899 (1977).

⁵³ See text accompanying note 7, *supra*.

⁵⁴ Victims of Crime Act of 1977, H. R. 7010, 95th Cong., 1st Sess.; S. 551, 95th Cong., 1st Sess., 123 CONG. REC. S1899 (1977).

These provisions are not mandatory requirements for state programs, but would disqualify the state from receiving federal matching funds for *only* those claims which do not meet these qualifications.⁵⁵

Several major issues which will require legislative decision-making include minimum loss requirements, financial-need requirements, compensable expenses and administration of the program. The existing state programs, federal proposed act, and the Uniform Act all vary widely on these issues. Numerous problems will arise in drafting any program, but these seem to represent the most controversial areas.

The majority of victim compensation programs have a minimum loss requirement, with the most frequent minimum award being \$100.⁵⁶ The usual reasons given for the minimum loss requirement are that the overall cost will be reduced and trivial claims will be avoided. The majority of victims in the United States incur either no medical costs at all or ones of less than \$100.⁵⁷ To set \$100 as a minimum loss requirement before a claim can be made will mean substantially fewer victims will be compensated. In summarizing the results of a recent federal government research project, the directors concluded that although a \$100 limit may severely restrict those who would be eligible, to have no limit at all may result in the pointless situation where the administrative costs of processing certain claims will exceed the amount of loss incurred by the victim.⁵⁸ For this reason, it is proposed that employment of a "moderate" minimum loss requirement (e.g. \$50) would be a reasonable compromise to the problem. Reducing the minimum loss requirement would reduce the incidence of "padding" claims so they will reach the minimum amount⁵⁹ and will also help counter criticism that victim compensation is only a

⁵⁵ *Id.*

⁵⁶ Comment, *Compensation for Victims of Violent Crimes*, 26 KAN. L. REV. 227, 246 (1978).

⁵⁷ GAROFALO & SUTTON, *supra* note 20, at 24.

⁵⁸ *Id.* at 29. The directors of the study concluded: ". . . [t]he deletion of a \$100 minimum net medical cost requirement would result in a three-fold increase in the number of eligible claims but that the corresponding increase in compensable medical costs would be only 10 percent." *Id.* at 39.

⁵⁹ Comment, *Rehabilitation of the Victim of Crime: An Overview*, 21 U.C.L.A. L. REV. 317, 341 (1973).

political or symbolic show of concern for victims in which only a few high-loss cases are reached.⁶⁰

Another highly debated issue of victim compensation is whether or not the granting of compensation to a victim should be based on a showing of financial need. Such a requirement is contrary to the theory of victim compensation, is unnecessary and should not be a provision of any state program. California,⁶¹ Maryland,⁶² and New York⁶³ all impose the requirement that the claimant be experiencing severe financial hardship, but the trend is away from imposing such financial-need requirements.⁶⁴ The Uniform Act allows for the inclusion of a financial-need requirement, but the drafters recommend the elimination of it.⁶⁵

The only major justification for a financial-need requirement would be to reduce the costs of a program.⁶⁶ The counter arguments, however, outweigh this consideration.⁶⁷ First, a financial-need requirement gives the program a welfare image which is politically undesirable and practically misleading. Second, requirements that all collateral source payments will reduce the final award would mean that those with adequate assets, who are probably insured, would already be precluded from recovery.⁶⁸ Third, such a requirement would cause more administrative expenses because it would entail difficult and time-consuming decisions to be made.⁶⁹ Fourth, the requirement is inconsistent with the risk-sharing theory as this rationale assumes that all must share equally in the costs of such a program and, therefore, would share equally in its benefits. In concluding the discussion of this issue, one writer noted, "[I]t is . . . apparent that the eligibility issue

⁶⁰ Harland, *Compensating the Victims of Crime*, 14 CRIM. L. BULL. 203, 213-14 (1978).

⁶¹ CAL. GOV'T CODE § 13964 (Deering) (1979 Supp.).

⁶² MD. ANN. CODE art. 26A, § 12(f) (1973 Replacement Vol.).

⁶³ N.Y. EXEC. LAW art. 22, § 631(b) (McKinney 1972).

⁶⁴ GAROFALO & SUTTON, *supra* note 20, at 15.

⁶⁵ UNIFORM CRIME VICTIMS REPARATION ACT, *supra* note 9.

⁶⁶ Comment, *Compensation for Victims of Violent Crimes*, 26 KAN. L. REV. 227, 238 (1978).

⁶⁷ *Id.* at 238.

⁶⁸ Gross, *Crime Victim Compensation in North Dakota*, 53 N.D. L. REV. 7, 30 (1976).

⁶⁹ Comment, *Compensation for Victims of Violent Crimes*, 26 KAN. L. REV. 227, 238 (1978). The writer also notes that, ". . . the N.Y. Crime Victims Compensation Board has found the test very difficult to administer and has recommended its abandonment." *Id.* at 238.

has turned on moral judgment, fiscal apprehension and theoretical hunch, yielding restrictions that are divorced from, and often inconsistent with, many of the philosophical justifications that might be thought to underlie the programs in the first place."⁷⁰ Program drafters should attempt to avoid these pitfalls.

The financial-need requirement has caused numerous headaches for program directors. The Maryland statute provides that an applicant shall not receive compensation unless he or she is suffering "serious financial hardship."⁷¹ In *Holmes v. Criminal Injuries Compensation Board*,⁷² seven minor children applied for benefits after the death of their mother. Collateral source payments from Social Security and the Veteran's Administration totaled \$817 a month. The mother had only been earning \$520 a month, but the children claimed she also provided maternal services worth \$634.90 a month. This would make their loss total \$1154.90, or \$239.90 more than the collateral source payments. The compensation board had denied the claim, saying the children did not suffer "serious financial hardship" because maternal services were not considered to be a loss of support or earnings. The Maryland court reversed, finding that maternal services were a loss within the meaning of the statute. Similarly, the federal proposal limits the allowance for child care to \$75 a week.

Another area which has generated case law is the usual requirement that before a third party may qualify for compensation, he must demonstrate his dependency upon the victim. In a New Jersey case, *Matter of Carr*,⁷³ the parents applied for compensation for the loss of their nine year old daughter, the victim of a rape-murder. The New Jersey compensation board only awarded them reasonable funeral expenses. The New Jersey court affirmed the board's decision holding that the parents were not dependents within the meaning of the statute. This problem should not arise in an adequately written statute which clearly indicates that wrongful death type benefits are not compensable items of recovery.

A third major area of concern is whether pain and suffering should be compensable elements of recovery. The vast majority of

⁷⁰ GAROFALO & SUTTON, *supra* note 20, at 13.

⁷¹ MD. ANN. CODE art. 26A, § 1-17 (1973 Replacement Vol.).

⁷² 278 Md. 60, 359 A.2d 84 (1976).

⁷³ 136 N.J. Super. 344, 346 A.2d 406 (1975).

states allow only "pecuniary loss" or "economic loss" which is usually defined as out-of-pocket expenses. Only Hawaii⁷⁴ and Minnesota⁷⁵ presently allow compensation for pain and suffering. While conceding that determinations of this type are difficult to make and hard to substantiate, it is proposed that awards for at least some form of psychic suffering should be allowed. Often in the case of rape or sexual assault the only injury is severe psychological damage. If actual pain and suffering damages are not to be awarded, at least the cost of psychological treatment and care should be awarded.

To prevent fraud or collusion, most victim compensation programs do not award benefits to any members of the family who are responsible for the crime. This provision occasionally may require interpretation. For example, in *Weisinger v. Van Rensselaer*,⁷⁶ the plaintiff was shot in the chest by his wife. Though they had been separated for about a year, compensation was denied.

A similar issue was involved in *Criminal Injuries Compensation Bd. v. Remson*.⁷⁷ The victim was killed by his brother-in-law and his nephew. A claim was filed by his wife and five children. Since the Maryland Act prevents family members, up to the third degree of affinity and consanguinity, of those who are responsible for the crime from becoming eligible to receive an award under the statute,⁷⁸ the claim was denied. The Maryland Court of Appeals first observed that there was no connection by consanguinity between the wife of the victim and the brother-in-law because consanguinity is a relationship by blood.⁷⁹ Affinity is the relationship by marriage to the blood relatives of the spouse. Therefore, the wife's claim was barred because she was related by affinity to the nephew; the children's claims were also barred because they were related by affinity to the brother-in-law of their father.⁸⁰

Administrative problems of existing programs have been solved by resort to one of three methods: (1) administration by the judiciary; (2) administration by an existing agency; or (3) administration by a newly created agency. Though administration by the

⁷⁴ HAWAII REV. STAT. § 351-33(4) (1968).

⁷⁵ MINN. STAT. ANN. § 199B.02(8) (West Cum. Supp. 1977).

⁷⁶ 362 N.Y.S.2d 126, 79 Misc.2d 1023 (1974).

⁷⁷ 282 Md. 168, 384 A.2d 58 (1978).

⁷⁸ MD. ANN. CODE art. 26A, §§ 2(d)(3) and 5(6)(b).

⁷⁹ 282 Md. at 182, 384 A.2d at 66.

⁸⁰ *Id.* at 196, 384 A.2d at 76.

court of claims or the circuit court personnel may theoretically be more objective, practically, the courts are overcrowded now and it would be unwise to add to their already burdensome duties.

Some states have selected an existing administrative agency, such as the workman's compensation board⁸¹ or the welfare board⁸² to manage the program. The majority of programs, however, call for the creation of a new administrative agency. While the use of an existing agency undoubtedly reduces the costs of the program,⁸³ it also means that the victim compensation program will inherit any existing problems or conflicts of that agency. Victim compensation is a novel and developing area of law and the creation of a new, specialized agency will facilitate its growth untainted by the biases or prejudices of improper attitudes that existing agencies may perpetuate.⁸⁴

Other recommended provisions are the requirement that the crime be reported to the police within a specified period of time and that if the victim consented to or provoked the injury, his award may be reduced or denied (similar to a comparative negligence theory). In addition, the crimes covered by the act should not be specified; good samaritans should be covered; provisions should be made for an award of reasonably necessary emergency payments before completion of the normal processing procedure; pregnancy or abortion resulting from rape should be a compensable element of recovery; funeral and burial expenses should be compensated in cases of death resulting from criminal attack; and most important, all public officials should be required to inform victims of the existence of the program.

Program Costs

The major impediment to enactment of victim compensation is the financial cost. In 1977, the federal government released the results of a national project designed to estimate the costs of operating a typical compensation program on a national level.⁸⁵ The conclusions of the report are based on very liberal estimates of medical costs and lost earnings and on total *estimated* crime in-

⁸¹ N.D. CENT. CODE § 65-13-03.1 (Supp. 1977).

⁸² ALASKA STAT. § 18.67.020(a) (1974).

⁸³ Gross, *Crime Victim Compensation*, 53 N.D. L. REV. 7, 31 (1976).

⁸⁴ McAdam, *Emerging Issue: An Analysis of Victim Compensation in America*, 8 URBAN LAWYER 346, 354 (1976).

⁸⁵ GAROFALO & SUTTON, *supra*, note 20.

stead of reported crime. As a result, the derived estimates are the *maximum* costs which would be incurred by the enactment of a national compensation program. Three estimates of total costs were produced.⁸⁶ Using a "stringent" minimum loss requirement (minimum net medical expenses of \$100 or more than 10 days unreimbursed work-time lost) the researchers concluded that the total cost of a program would be approximately \$144 million. Using a "moderate" minimum loss requirement (minimum net medical expenses of \$50 or more than 5 days unreimbursed work-time lost) the study found that the costs would be about \$174 million. Finally, with no minimum loss requirement at all, the costs would reach about \$261 million.

Some evaluations of the costs of state programs have been performed, but these estimates are usually inadequate.⁸⁷ The main problem is that few programs have begun operating with the effectiveness planned. Lack of public awareness and numerous eligibility requirements have resulted in the unfortunate consequence that in many states only a small percentage of victims receive compensation.

Though of limited value, a few studies of existing programs have been published. New York's program, instituted in 1967, was the subject of a 1973 study.⁸⁸ The figures for fiscal year 1971 indicated that grants and administrative costs totaled \$1,571,174 and the estimate for 1972 was \$2,186,144.⁸⁹ After one year of operation in 1975-76, the North Dakota Crime Victims Reparation Board received 32 claims and made 12 awards totaling \$18,080 with the administrative costs totaling \$9,724.⁹⁰ During fiscal year 1972-73, California's State Board of Control awarded \$553,482 to victims of crime.⁹¹

These figures have little relevance, however, as they depend upon the amount of crime in that particular state. What is needed

⁸⁶ *Id.* at 37 (Table 14).

⁸⁷ *Id.* at 12.

⁸⁸ Edelhertz, Geis, Chappell, & Sutton, *Part II: Public Compensation of Victims of Crime: A Survey of the New York Experience*, 9 CRIM. L. BULL. 101 (1973).

⁸⁹ *Id.* at 121 (Table IV).

⁹⁰ Gross, *Crime Victim Compensation in North Dakota*, 53 N.D. L. REV. 7, 28-9 (1976).

⁹¹ H. EDELHERTZ & G. GEIS, *PUBLIC COMPENSATION TO VICTIMS OF CRIME* 93 (1974).

is a comprehensive evaluation of the costs of a state program, similar to the governmental study which evaluated the costs of a national program. The possibility of federal funding may make victim compensation a reality for some states which otherwise would not have the tax base to support such a program.

Conclusion

West Virginia does not yet have a crime victim compensation program, though several bills have been introduced in the state legislature. In light of the foregoing rationales, needs, and experiences of other states it is recommended that the West Virginia Legislature seriously consider adopting a program tailored to the needs of the state.

For too many years, rights of the criminal have been concentrated on to the exclusion of those of the victim's. The early seventies saw a great surge of interest in compensating the victims of violent crimes, but much of this has been criticized as emotionally laden issues raised only for political purposes. Whatever the original motivations for the programs, it should be evident that criminal victimization is a real phenomenon in our daily lives. Victim compensation need not be merely a placebo which reaches only a small proportion of these victims. Comprehensive, workable programs can, and should be, made a reality.

Kathleen Virginia Duffield

